92-212

No. 91-212

Office - Supreme Court, U.S.
FILED
SEP 14 1992
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J. TRUETT PAYNE COMPANY, INC.,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

J. Ross Forman, III
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000
Counsel for Respondent

Of Counsel:
Thomas, Taliaferro, Forman,
Burr & Murray
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

QUESTIONS PRESENTED

Respondent objects to petitioner's questions presented for review since these questions are argumentative and contain statements as fact for which the Fifth Circuit Court of Appeals has on two separate occasions found there to be no evidentiary basis in the record. The only question presented by the petition is:

1. Whether the Supreme Court should review the finding of the Fifth Circuit Court of Appeals that there was insufficient evidence in the record to prove: (1) a violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a), (2) antitrust injury, and (3) the damages allegedly suffered?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
I. The Proceedings	2
II. The Facts	4
REASONS FOR DENYING THE WRIT	11
I. This Court Lacks Jurisdiction To Consider This Matter	11
II. No Question Of National Importance Is Presented	12
III. The Fifth Circuit's Opinion Is Not In Conflict With Any Decisions Of This Court Or Any Court Of Appeals	13
IV. Petitioner Is Really Requesting This Court To Resurrect The Discredited Automatic Damage Theory	15
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

Cases	Page
Alterman Foods, Inc. v. FTC, 497 F.2d 993 (5th Cir. 1974)	13
American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951)	13
Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972)	14
Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946)	15
Borden Co. v. FTC, 381 F.2d 175 (5th Cir. 1967)	13
Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947)	15
Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 670 F.2d 575 (1982)	2, 4
Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 607 F.2d 1133 (5th Cir. 1979), *vacated*, 451 U.S. 557 (1981)	3
Colonial Stores, Inc. v. FTC, 450 F.2d 733 (5th Cir. 1971)	13
Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965)	13
Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970)	16
FTC v. Morton Salt Co., 334 U.S. 37 (1948)	14
Hanover Shoes, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968)	14
Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974)	13
Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir. 1973)	13
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	14

TABLE OF AUTHORITIES – Continued

Page

J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981) 2, 3, 4, 12

Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266 (5th Cir. 1979) 13

NLRB v. Hendricks City Rural Electric Corp., ___ U.S. ___, 70 L. Ed.2d 323 (1981) 12

Perkins v. Standard Oil Co. of California, 395 U.S. 642 (1969) 14

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 14

Rudolph v. United States, 370 U.S. 269 (1962) 12

Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924) 12

Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974) 13

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 15

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 15

Statutes:

Clayton Act, Section 2 (Robinson-Patman Act), 15 U.S.C. §13 ..... i, 2, 3, 12, 13, 17

Supreme Court Rule 17 12

Supreme Court Rule 20 11

Supreme Court Rule 21 ..... 11, 12

Supreme Court Rule 33 11

28 U.S.C. §2101(c) 11

Other Authorities:

H.R. Conference Rep. No. 2951, 74th Cong., 2d Sess. (1936) 17

No. 81-212

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

J. TRUETT PAYNE COMPANY, INC.,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case is unacceptable since it is incomplete and, like the entire petition, is full of misstatements as to what the probative evidence in the record proved. The Fifth Circuit Court of Appeals has now twice reviewed the evidence in this case and has twice found the evidence insufficient to support a verdict in favor of the petitioner, J. Truett Payne Company, Inc. (hereinafter sometimes referred to as "Payne"). While we do not intend to summarize the Fifth Circuit's opinions, we do feel compelled to point out the most blatant misstatements and omissions of the petitioner so that this Court will not be misled by the petition.

I. The Proceedings.

This is a §2(a) Robinson-Patman Act, 15 U.S.C. §13(a), secondary line price discrimination case wherein the petitioner asserted that certain sales incentive programs[1] sponsored by the respondent, Chrysler Motors Corporation[2] (hereinafter sometimes referred to as "Chrysler"), resulted in price discrimination.

Following the adverse jury verdict and denial of its motion for judgment notwithstanding the verdict or for new trial, Chrysler appealed to the Fifth Circuit Court of Appeals on several separate and distinct grounds, summarily categorized as follows:

> First, that there was a total failure of proof of a violation of §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a), since each sales incentive program was carefully designed to provide all Chrysler dealerships with an equal opportunity to participate therein and to receive equal incentive payments for equivalent performance. Chrysler also argued there was insufficient evidence to prove that there was a reasonable possibility that injury to competition might result from the programs;
>
> Second, that petitioner was not entitled to recover damages under §4 of the Clayton Act, 15 U.S.C. §15, since it had failed to prove (1) that it had in fact suffered antitrust injury as a proximate consequence of said programs and (2) the amount of antitrust damage allegedly suffered;
>
> Third, that several parts of the trial judge's charge to the jury were erroneous.
>
> Fourth, that several evidentiary rulings by the trial judge were erroneous.

---

[1]The sales incentive programs involved in this case are adequately described in this Court's decision in *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 559-60 (1981) (App. 13-14), and in the Fifth Circuit's decision of *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 578-79 (1982) (App. A-5 - A-7).

[2]Chrysler Motors Corporation is a wholly owned subsidiary of Chrysler Corporation.

In its initial decision, the Fifth Circuit only found it necessary to consider the question of whether the requirements of §4 of the Clayton Act had been satisfied. The court held that petitioner had not satisfied the requirements for recovering damages under §4 since it (1) failed to prove that it had sustained cognizable antitrust injury from the sales incentive programs and (2) failed to prove the approximate amount of any such injury. *Chrysler Credit Corp. v. J. Truett Payne*, 607 F.2d 1133 (5th Cir. 1979) (App. 25-33).

Following the Fifth Circuit's initial decision, this Court granted *certiorari*. Contrary to petitioner's assertion (Pet. 3, 5, 25), this Court did not reverse the Fifth Circuit's decision. Instead, this Court unanimously rejected the petitioner's "automatic damage" argument, and then, in a 5 to 4 decision, vacated the Fifth Circuit's judgment and remanded with the instruction that the Fifth Circuit should first decide whether Chrysler's sales incentive programs violated §2(a) of the Robinson-Patman Act before considering petitioner's injury and damage evidence. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (App. 11-24). The Court made it clear that it was intimating no view on how the injury and damage issue should be decided if the Fifth Circuit found a violation of the Robinson-Patman Act on remand; however, the Court did point out that the petitioner's injury and damage evidence was weak and not nearly as substantial as the evidence in the cases where this Court had found sufficient evidence of injury and damage. 451 U.S. at 565, 567, 568 (App. 19, 21, 22).

On remand, the Fifth Circuit did exactly what this Court had directed. The parties were directed to file supplemental briefs containing specific references to the evidence in the record. After reviewing these briefs and the record, the Fifth Circuit found that the record did not contain sufficient evidence to permit the jury to find a violation of §2(a), antitrust injury, or damage, and, again, directed judgment to be entered in favor of Chrysler. In making its decision on injury and damage, the Fifth Circuit gave due consideration to the leniency cases cited in this Court's decision in this case. The court did not consider

or decide any of Chrysler's other grounds for reversal, including whether the defense of availability had been proven, or whether the trial judge had committed error in the challenged evidentiary rulings and instructions to the jury. *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575 (5th Cir. 1982) (App. A-1 - A-15).

II. The Facts.

Petitioner's misstatements and omissions of facts necessitate a restatement of the evidence or lack of evidence.

Petitioner asserts that during the period involved in this case, it competed with three other Chrysler dealers located in the greater Birmingham metropolitan area, and that customers compared Payne's prices with prices of each of the other three dealers. The evidence petitioner cites as proving this assertion is the hearsay testimony of Mr. Payne that customers had told him that they shopped prices.[3] (Pet. 5, 6) (Tr. 45-46, 124; App. 64-67, 139). No other evidence was offered to prove that these three dealers competed with Payne or to prove the degree of competition.

Petitioner then uses these assertions as a spring board for his claim that the sales incentive programs allowed the allegedly competing Chrysler dealers to undersell it, which caused Payne to lose new car sales and to lose profits by having to reduce its resale price by overallowing on used cars traded-in. Again, as this Court has already noted, the evidence petitioner relies on to prove underselling is Mr. Payne's hearsay testimony of what customers and salesmen told him. *J. Truett Payne Co.*, 451 U.S. 563, 564, 570 (App. 17, 18, 24). *See also, Chrysler Credit Corp.*, 670 F.2d at 581 (App. A-11). No corroborating evidence of any kind was offered to support Mr. Payne's bare assertion. No alleged competitor testified as to what he did with the incentive money he received, and no customer or salesman testimony was offered. Additionally, no comparative pricing evi-

[3]All hearsay testimony in this case was duly objected to by Chrysler, but was overruled by the trial court. (Tr. 47, 48; App. 68, 70).

dence was offered. In fact, there is no evidence of what Payne or any of the other Chrysler dealers were selling cars for during any of the challenged incentive programs. Moreover, Mr. Payne contradicted his hearsay and conclusory testimony of underselling by admitting that he did not think that his competitors passed the incentive money on to the retail customers by way of price reductions. (Tr. 85; App. 91).

Petitioner's evidence of overallowance on used car trade-ins and new car lost sales is as lacking as its evidence of underselling. Not only is there no evidence to link overallowances and lost sales to the incentive programs, there is no probative evidence of any overallowances or lost sales. The evidence petitioner cites to prove overallowances and lost sales (Tr. 55, 65-70, 91-95, 124-127, 711-712; App. 77, 80-87, 97-104, 139-142, 215-217), is nothing other than Mr. Payne's speculative, conclusory allegations to this effect. No corroborating evidence of lost sales or overallowances was introduced. In fact, Mr. Payne admitted on cross-examination that he did not have any evidence that he had lost any sales because of the incentive programs. (Tr. 93; App. 100-101). Further, Mr. Payne demonstrated that his overallowance testimony was speculative by prefacing this testimony with the statement that he would *possibly* have to overallow on trade-ins in order to make a deal. (Tr. 55; App. 77). If Payne had in fact ever overallowed, it could easily have been proven through Payne's sales records; however, no such evidence was offered.

As might be expected, since this Court's decision in this case, wherein Petitioner's evidence was characterized as weak, petitioner has devised two new evidentiary arguments to try and bolster its claims of overallowance and lost sales. In fact, Payne candidly admitted that it had never presented these arguments to this Court before. (Pet. 19, 20-21). One questions how petitioner could have overlooked what it now contends to be such critical evidence. However, a review of the record answers this question – there is no factual basis to support these arguments. Further, these arguments were made to the Fifth Circuit upon remand and were rejected.

Petitioner's overallowance argument is based on the fact that Payne realized the smallest profit on its used car sales of any of the Chrysler dealers in the Birmingham metropolitan area. Payne claims that this somehow proves that it overallowed on trade-ins. (Pet. 7, 8, 20-22). However, petitioner never introduced any evidence to show any causal connection between the low used car profits and the alleged overallowances. In fact, as already pointed out, there was no probative evidence that any overallowances had ever been made. Moreover, Mr. Payne attributed his low used car profits to having to wholesale his used cars because he could not obtain adequate used car financing to maintain the used cars in stock.[4] (Tr. 98-100, 122; App. 108-112). Additionally, the low used car profit margin would only reflect an overallowance on trade-ins if petitioner entered the trade-in on its books at the inflated value allowed. Petitioner never offered any evidence to prove whether it entered used car trade-ins on its books at the inflated or real value. Further, since an overallowance on a trade-in is nothing other than a reduction of the new car sales price, logic suggests that any overallowance would be reflected in the new car gross profit rather than in the used car profit. Interestingly, during the period involved in this case, Payne realized the highest average new car gross profit of any of the Chrysler dealers in the Birmingham area. (Def. Ex. 31, App. 54).

The statistical evidence in the case also demonstrates that the low used car profit realized by Payne was not the result of overallowances caused by the sales incentive programs. This is evident from a comparison of Defendant's Exhibits 31 and 36.[5] As these exhibits show, in 1972 Payne received its lowest bonus per new retail unit sold of any of the years involved in this case. (Def. Ex. 36). However, in this same year (1972), Payne real-

---

[4]This testimony by Mr. Payne also totally undermines the unsupported speculation by petitioner that the low used car profits caused a reduction in Payne's used car financing. (Pet. 20). According to Mr. Payne, the credit restriction is what caused the low used car profit, not vice versa.

[5]Defendant's Exhibit 31 is set forth on pages 54 and 55 of the Appendix to the petition the pertinent part of Defendant's Exhibit 36 provided:

ized its highest gross profit on used car sales and lost less money than during 1971 or 1973, when it received the largest bonus per new retail unit sold of any of the Birmingham Chrysler dealers. (Def. Ex. 31, App. 55). If the sales incentive programs had forced Payne to overallow on trade-ins as it contends, Payne's 1972 used car profit should have been less than its 1971 and 1973 used car profits, since it received a smaller bonus per new retail unit sold in 1972 than any of the other dealers. (Def. Ex. 36). Payne completely failed to prove that its used car performance was in any way connected to how it performed in any of Chrysler's sales incentive programs.

Petitioner's other new evidentiary argument is an attempt to show lost sales by comparing Payne's new car sales and profits in 1968 to sales and profits for the years 1970-1974. (Pet. 7-8, 12-13, 19). There is no evidentiary basis in the record for making this comparison. In fact, there is a virtual void of evidence concerning the year 1968. This demonstrates the after-the-fact nature of this argument. The only evidence concerning 1968 is Payne's 1968 Dealer Financial Statement (Pet. Ex. 61) which was introduced into evidence solely to assist petitioner's expert with his "going concern" value testimony. (Tr. 213-14; App. 165-67). No evidence was introduced to show the competitive nature or makeup of the market in 1968. No evidence was introduced as to how the various dealers performed under the incentive programs or whether Chrysler ever offered any sales incentive programs during 1968. Additionally, the speculative calculations which petitioner had to undertake to attempt to make use of the year 1968 (Pet. 7, n. 2) demonstrates that the petitioner never intended to use 1968 data to show lost sales. Petitioner simply failed to lay the evidentiary foundation necessary to allow 1968 to be compared to anything.

AVERAGE INCENTIVE MONEY PAID
PER NEW RETAIL UNIT SOLD

DEALER	1971	1972	1973
Payne	$72.00	$34.00	$51.00
Central	59.00	80.00	40.00
Roebuck	63.00	62.00	28.00
Vestavia	55.00	72.00	32.00

One of petitioner's most glaring misstatements of evidence is its assertion that 1968 was the only non-discriminatory year for which there was evidence. (Pet. 7). No cite was given to support this assertion, and none could be given, since, as pointed out, there is no competitive information in the record concerning 1968 and no information as to whether any sales incentive programs were conducted or not during that year. In fact, petitioner's expert, Dr. Ignatin, testified that he had been *advised* that sales incentive programs conducted prior to 1970 would be irrelevant to this case. (Tr. 271; App. 200-201). Payne's assertions concerning the year 1968 represent nothing other than sheer speculation.

Furthermore, the 1968 comparison is faulty since the retail market underwent change during the years 1970-1973. For example, Roebuck was obviously not in full operation in 1968 since it did not receive its franchise until April, 1967. (Plt. Ex. 55). If Roebuck was indeed in competition with Payne, as Payne alleges, Payne's percentage share of the market should have decreased as Roebuck became a market force. Additionally, in May, 1971, Hall Motor Company moved its dealership from Bessemer, Alabama to Vestavia, Alabama. (Tr. 318-319; Plt. Ex. 55). This relocation could well have affected the petitioner's percentage share of the market. (Tr. 272-274; App. 202-205). Further, petitioner's Dealer Financial Statements offer an explanation for Payne's decrease in percentage share of the market after 1968, since Payne had reduced the number of new car salesmen which it employed. In 1968, Payne employed 12 new car salesmen, while it only employed 9 in 1970 and 6 in the years 1971 through 1973. (Plt. Ex. 32, 33, 34, 35, 61). Petitioner simply failed to introduce sufficient evidence to connect the sales incentive programs with any changes in petitioner's market share percentage in 1968 or any other year.

Petitioner's expert, Dr. Ignatin, offered no probative evidence of injury to competition, actual competitive injury to Payne, or the amount of damage allegedly suffered. Dr. Ignatin's injury testimony was limited to unsupported hypothetical analysis of the predicted effects of the sales incentive programs.

J. Truett Payne, 451 U.S. at 570 (App. 24); *Chrysler Credit Corp.*, 670 F.2d at 581 (App. A-11). (Tr. 202-204; App. 146-150). Dr. Ignatin even prefaced his injury testimony with the caution that his testimony was based to some degree on speculation. (Tr. 202; App. 147). Dr. Ignatin made no investigation into whether the Chrysler dealers made competitive use of the incentive money received and offered no specific testimony concerning lost sales or overallowances on trade-ins. (Tr. 255-256; App. 182). In fact, Dr. Ignatin's testimony *conflicted* with Mr. Payne's allegations of underselling by competitors since he concluded that the predicted effect of the sales incentive programs was to keep retail prices at an artificially *high* level. (Tr. 202-204; App. 146-150). Dr. Ignatin failed to offer any probative evidence that there was a *reasonable* possibility that the incentive programs would substantially injure competition among the Birmingham Chrysler dealers.

Dr. Ignatin's damage testimony is also lacking since he failed to offer any testimony as to the profits lost from lost sales or overallowances on trade-ins. Having failed to quantify the alleged lost profits, Dr. Ignatin could not connect the sales incentive programs to the petitioner's business failure. Additionally, Dr. Ignatin's "going concern" value testimony was based on speculation and assumptions which were not supported by the evidence in the record. *Chrysler Credit Corp.*, 670 F.2d at 582 (App. A-13 - A-14). Dr. Ignatin failed to consider local market changes or conditions in making his "going concern" testimony and failed to give any consideration to the future sales which reasonably could have been expected or the cost which would have been incurred in making said sales. *Id.* (Tr. 265, 270-272; App. 192, 202). Moreover, the evidence proved that Dr. Ignatin's basic assumption – that the local dealers' performances reflected Chrysler's overall performance – was erroneous. For example, the evidence demonstrated that the local Birmingham Chrysler dealers were experiencing a decline in profits over the period 1970 through 1973, while Chrysler was experiencing an increase in profits. (Tr. 606-608). Further, the local dealers did not experience the high losses experienced by Chrys-

ler in 1974 and 1975 nor the large increase in profits experienced by Chrysler in 1976. (Tr. 609-610).

Besides misstating the evidence, petitioner neglected to mention other important facts proven by substantial evidence. Petitioner failed to point out that each of the sales incentive programs lasted only a few months in duration, and, that even under the petitioner's method of calculating the alleged amount of the price discrimination, the per unit difference between what the best performing dealer and what the worst performing dealer received under each program was generally quite small. (Plt. Ex. 37-54; App. 36-53). There was no evidence introduced to show that if such a difference had been reflected in a price reduction, or if other competitive use had been made of the price difference, sales would have been diverted to the so-called favored dealer. Additionally, because of the very nature of the programs, the evidence showed that the so-called price advantage constantly shifted among all four of the Chrysler dealers in the Birmingham metropolitan area, including the petitioner. (Plt. Ex. 37-54; App. 36-53). The inherent fairness of the programs was demonstrated by the fact that over the period involved in this litigation, the average difference between what the best performing dealer and the worst performing dealer received was only *eleven dollars* per car. *Chrysler Credit Corp.*, 670 F.2d at 581 (App. A-12). (Tr. 580-82; Def. Ex. 37).

Payne also neglected to point out that it devoted c rable sales attention toward making fleet sales.[6] During the period involved in this case, over twenty-four percent of Payne's new car sales were fleet sales. (Tr. 104, App. 118; Def. Ex. 31, App. 54). Payne's efforts toward making fleet sales were not unrewarded since Chrysler sponsored fleet sales incentive programs in addition to their retail sales incentive programs. (Def. Ex. 2). During the period involved in this suit, Payne received

[6]A fleet sale is a new car sale to a qualified fleet purchaser (one who purchases in large numbers), such as the Alabama Power Company. (Tr. 77-78; App. 87-88).

$62,185.00 under fleet sales incentive programs, while the next highest Chrysler dealer in the Birmingham area received only $7,185.00. (Def. Ex. 27). When the money received under the fleet programs is combined with the money received under the retail sales incentive programs, Payne received $161,122.78, while Roebuck received $141,590.00, Central $102,784.29, and Hall $80,555.00. (Def. Ex. 27, 28).

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction To Consider This Matter.

Petitioner's motion for rehearing was denied by the Fifth Circuit on April 26, 1982. (App. A-16). The ninety day period for filing a Petition for a Writ of *Certiorari* with this Court expired on Sunday, July 25, 1982, making Payne's petition due to be filed on Monday, July 26, 1982. Payne's petition was received by the Clerk of this Court on Monday, July 26, 1982, but the Clerk refused to accept the petition due to the failure of Payne to follow Rules 21 and 33 of this Court's Rules. The corrections required by the Clerk were not received until August 6, 1982, yet the Clerk marked the petition as filed on July 26, 1982, the day it was initially received. Certainly, the ninety days allowed by 28 U.S.C. §2101(c) was sufficient time for filing a petition which satisfied the Rules of this Court, and petitioner's failure to do so should not be excused. The Clerk should not have back dated the filing of the petition to July 26, 1982, and the petition should have been rejected as untimely. Sup. Ct. Rule 20.3.

Additionally, the petition violates other Rules of this Court which justify denying the petition. Rule 21.1(a) requires the questions presented for review to be short, concise and not argumentative. Petitioner's questions are argumentative and full of conclusory statements of fact for which the Fifth Circuit has twice found there to be no evidentiary basis in the record. The petition is nothing other than a brief on the merits which fails to clearly articulate any special and important reasons for grant-

ing the petition, as required by Rule 17. These failures constitute grounds for denying the petition. Sup. Ct. Rule 21.5.

II. No Question Of National Importance Is Presented.

The petition is really nothing more than an argument on the merits challenging the Fifth Circuit's ruling on the sufficiency of the evidence. The petition raises no issue of national importance for this Court to decide. The only issue of national importance ever involved in this case was the question of whether the "automatic damage" theory, which had split the Circuit Courts of Appeal, was a viable damage theory in a §2(a) Robinson-Patman Act treble damage case. This Court unanimously rejected the automatic damage theory and remanded the case to the Fifth Circuit to consider whether there was sufficient evidence to establish a violation of §2(a), and, if so, whether there was sufficient evidence to prove antitrust injury and the amount of damage. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (App. 11-24).

In accordance with this Court's instructions, the Fifth Circuit again reviewed the evidence in the record to determine whether there was sufficient evidence of a violation of §2(a), antitrust injury, and the amount of antitrust damage. The court even directed the parties to file supplemental briefs containing specific references to the record to support their positions. *Chrysler Credit*, 670 F.2d at 578 (App. A-5). After reviewing the briefs and making a second review of the record, the Fifth Circuit concluded that there was insufficient evidence to prove a violation of §2(a), antitrust injury, or the amount of damage. The Fifth Circuit's opinion is purely a decision on the sufficiency of the evidence in this case which has no importance to anyone other than the individual parties. As this Court has noted numerous times, sufficiency of the evidence cases do not merit consideration by this Court. *NLRB v. Hendricks City Rural Electric Corp.*, ____ U.S. ____, 70 L. Ed.2d 323, 330 n. 8 (1981); *Rudolph v. United States*, 370 U.S. 269 (1962) (*per curiam*); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

There is no reason for this Court to monitor the Fifth Circuit as to the sufficiency of the evidence, especially after this Court has already found Payne's evidence to be weak and less substantial than the evidence in any case where this Court has found sufficient proof of antitrust violation, injury and damage. *J. Truett Payne*, 451 U.S. at 565, 567, 570 (App. 19, 21, 24). Accordingly, the petition should be denied.

III. The Fifth Circuit's Opinion Is Not In Conflict With Any Decisions Of This Court Or Any Court Of Appeals.

Petitioner attempts to make an argument that the Fifth Circuit has imposed an unreasonably strict standard for proving a violation of §2(a) of the Robinson-Patman Act, antitrust injury, and the amount of damage, which is in conflict with decisions of this Court and other Courts of Appeals. However, this argument is undermined by petitioner's constant citing of Fifth Circuit cases for what constitutes the proper standard of proof for each of these elements. For example, as representing the proper standard of proof of a violation of §2(a), petitioner cites: *Alterman Foods Inc. v. FTC*, 497 F.2d 993 (5th Cir. 1974) (Pet. 14); *Colonial Stores, Inc. v. FTC*, 450 F.2d 733 (5th Cir. 1971) (Pet. 14); *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967) (Pet. 15); and *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965) (Pet. 15). As representing the proper standard for proving antitrust injury, petitioner cites: *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974) (Pet. 12, 25); *Foremost Dairies, Inc. v. FTC, supra* (Pet. 25); and *American Can Co. v. Bruce's Juices*, 187 F.2d 919 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951) (Pet. 25). And, as representing the proper standard to prove the amount of antitrust damage, petitioner cites: *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266 (5th Cir. 1979) (Pet. 28); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974) (Pet. 28); and *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894

(5th Cir. 1973) (Pet. 29). It is clear from the Fifth Circuit's opinion that the court was well aware of these decisions and simply concluded that the standards of proof announced in these cases had not been satisfied by the petitioner.

The Fifth Circuit's decision is not in conflict with *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) or its progeny, since this is a treble damage case, not an injunction case. This Court has already recognized this important distinction and has held that *Morton Salt* and its progeny are not relevant to the facts in this case. *J. Truett Payne*, 451 U.S. at 561 (App. 15). Moreover, as pointed out by the Fifth Circuit, the petitioner's evidence failed to establish any of the facts upon which *Morton Salt* and its progeny were based. *Chrysler Credit*, 670 F.2d at 581 (App. A-12).

Petitioner's reliance on *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969) and *Bargain Car Wash, Inc. v. Standard Oil Co.*, 466 F.2d 1163 (7th Cir. 1972) is also misplaced, since there was substantial evidence of a violation of §2(a), antitrust injury, and damages in these cases. In *Bargain Car Wash*, there was substantial probative evidence of underselling by the favored competitors, along with evidence of increased sales volume by the favored competitors and a corresponding sales loss of over forty percent by the plaintiff. 466 F.2d at 1170. Likewise, in *Perkins v. Standard Oil Co.*, there was substantial probative evidence of underselling by the favored competitors coupled with evidence of a corresponding loss of business by the disfavored plaintiff. 395 U.S. at 645, 648, 649. There was no such probative evidence in the case at bar.

The Sherman Act cases of *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Hanover Shoes Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) are of no help to petitioner since each of these cases involved a *per se* violation of the Sherman Act. In such cases, there is no need to prove any competitive injury. However, competitive injury must be proven in a §2(a) treble damage action. *J. Truett Payne Co. v. Chrysler Motors Corp.*,

supra. This Court has recognized the fundamental differences between the Sherman Act and the Robinson-Patman Act and has stated that the "entire basis for judging under the two Acts is different and that the case law as to the Sherman Act does not fit the Robinson-Patman Act." *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 756 (1947). *See, United States v. United States Gypsum Co.*, 438 U.S. 422, 450-51 (1978).

Finally, the Fifth Circuit's decision in no way conflicts with *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) or *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946). As this Court has recognized, much more substantial evidence of antitrust injury and damage was present in *Bigelow* and *Zenith* than was present in the case at bar. *J. Truett Payne Co.*, 451 U.S. at 567 (App. 21). Further, it is clear from the Fifth Circuit's opinion that it gave due consideration to the leniency standard of proof expressed in *Zenith* and *Bigelow*, yet, still concluded that the evidence was insufficient to prove antitrust injury and damage.

In short, the Fifth Circuit merely held that a violation of §2(a), antitrust injury, and the amount of damage could not be proved by speculative, conclusory, or hypothesized testimony for which there was no support in the record. None of the cases cited by the petitioner stand for the proposition that the requirements necessary to recover treble damages may be proved by such testimony.

IV. Petitioner Is Really Requesting This Court To Resurrect The Discredited Automatic Damage Theory.

When all of petitioner's evidentiary arguments are cut through, it is clear that what Payne is really asking this Court to do is to overrule its prior unanimous holding and to resurrect the "automatic damage" theory. Payne's position is brought to light by the last sentence on page 11 of the petition, by the first sentence on page 16, and by the last sentence on page 22. On each occasion, the petitioner asserts that antitrust injury

and damage may be presumed from evidence of a substantial price discrimination in a market of keen competition. (Pet. 29). This assertion is nothing other than a restatement of the automatic damage theory. *See, Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). This Court has already unanimously rejected this theory, and there is no reason for reconsidering it. *J. Truett Payne*, 451 U.S. at 561 (App. 15).

Petitioner attempts to disguise what it is really seeking by stating:

> Payne is not contending that price discrimination coupled with other corroborating evidence, *automatically* infers injury. Chrysler is free to show that the disfavored purchaser was not injured in any way by the discriminatory prices.

(Pet 31). Payne is attempting to avoid this Court's earlier rejection of the automatic damage theory by asking the Court to adopt the automatic damage presumption of injury but to not make the presumption conclusive, so that the defendant may attempt to disprove injury. In other words, Payne wants the burden of proof shifted from the plaintiff to the defendant. This Court has already rejected this idea by making it clear in its opinion in this case that even if a violation of the Robinson-Patman Act was proved, Payne was not excused from its burden of proving antitrust injury and damages. *J. Truett Payne*, 451 U.S. at 568 (App. 22).

Petitioner also seeks to breathe new life into the automatic damage theory by insisting that the amount of the price discrimination be recognized as a measure of damage. (Pet. 28-30). Payne argues that this Court's rejection of the automatic damage theory did not preclude the amount of the price discrimination being presumed to measure the damage suffered once antitrust injury was proved, since the automatic damage argument was a proximate cause argument, not a measure of damage argument. (Pet. 30). This simply is not true. As *Fowler Mfg. Co. v. Gorlick, supra*, makes clear, the automatic damage argument is both a causation and a measure of damage

argument, since under this theory, the amount of the price discrimination was presumed to represent the minimum damages suffered. Thus, the Court has already rejected petitioner's contention. Further, it is axiomatic that antitrust damage must approximate the antitrust injury suffered. *Zenih Radio Corp. v. Hazeltine Research, Inc., supra*; *Bigelow v. RKO Radio Pictures, Inc., supra.* In this case, it is clear that the amount of the price discrimination does not measure the antitrust injury which the petitioner claims it suffered — *i.e.,* lost sales and overallowances on trade-ins. Thus, the alleged price discrimination is not a measure of damage in this case.

Moreover, Plaintiff's argument that the amount of the price discrimination is a proper measure of damage flies in the face of the legislative history of the Robinson-Patman Act. As this Court has noted, the Senate version of the Robinson Bill established the amount of the price discrimination to be the minimum measure of damage. *J. Truett Payne,* 451 U.S. at 562 (App. 16). The Bill was then changed to authorize presumptive damages in the amount of the price discrimination only after the plaintiff had otherwise proven the "fact of damage." *Id.* at 563 (App. 17). Nevertheless, this provision was eliminated by the Conference Committee with the pronouncement that:

> "The Senate Bill set up a *new measure of damages* for violations of the law, whereas the House Bill left the damages to be determined in accordance with the provisions of the existing Clayton Act. The Senate receded."

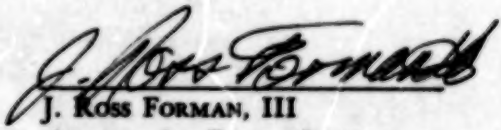
H.R. Conference Rep. No. 2951, 74th Cong., 2d Sess. (1936). Thus, it is clear that Congress did not intend for the amount of the price discrimination to be a measure of the damages suffered by a violation of §2(a) of the Robinson-Patman Act.

CONCLUSION

Upon remand, the Fifth Circuit did exactly what this Court asked. It reviewed the evidence to determine whether there was proof of a violation of §2(a) and reconsidered its injury and damage decision in view of this Court's leniency standard. Upon its review of the evidence, the Fifth Circuit found that there was not sufficient evidence in the record to prove a violation of §2(a), antitrust injury, or the amount of damage. Having disposed of the only issue of national importance meriting its review, namely, the automatic damage issue, this Court should not now undertake merely another review of the evidence.

For these reasons, it is respectfully submitted that the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,



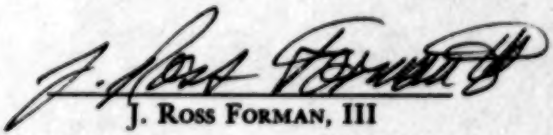
J. Ross Forman, III
Attorney for Respondent,
Chrysler Motors Corporation
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

Of Counsel:
Thomas, Taliaferro, Forman,
Burr & Murray
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

CERTIFICATE OF SERVICE

I, J. Ross Forman, III, a member of the Bar of this Court, hereby certify that three copies of Respondent's Brief In Opposition have been served upon the Honorable C. Lee Reeves, attorney of record for petitioner, at 2222 Arlington Avenue, South, Birmingham, Alabama, 35205, by depositing the same in the United States mail, first class postage prepaid, and properly addressed on this the 10th day of September, 1982.

It is further certified that all parties required to be served have been served.



J. ROSS FORMAN, III